No. 87-1752

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GERDA DOROTHEA DE WEERTH,

Petitioner,

vs.

EDITH MARKS BALDINGER AND
WILDENSTEIN & CO., INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT BRIEF IN OPPOSITION

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May 23, 1988

QUESTIONS PRESENTED

1. Did the Court of Appeals err in reviewing *de novo* the district court's construction and application of a legal standard to a set of undisputed facts?

2. Did the Court of Appeals abuse its discretion in refusing to certify a question of state law to the state's highest court where: (1) no party to the appeal requested certification; (2) the party now demanding certification chose a federal forum to litigate a state law claim; and (3) the Court of Appeals is familiar with the state law in issue?

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JOINT BRIEF IN OPPOSITION

Edith Marks Baldinger and Wildenstein & Co., Inc. ("Wildenstein")[1] respectfully submit this joint brief in opposition to the petition for a writ of *certiorari* of Gerda Dorothea De Weerth (the "Petition").

1 Wildenstein has no parent companies, subsidiaries or affiliates.

STATEMENT OF THE CASE

This common law diversity case concerns a dispute over the ownership of a painting by Claude Monet entitled "Champs de Blé à Vétheuil" (the "painting" or the "Monet").[2] The painting was purchased in 1957 by respondent Edith Marks Baldinger (then Mrs. Carl Marks) from respondent Wildenstein, a New York art gallery and dealer. Mrs. Baldinger purchased the painting in good faith, and without notice of any adverse claim, for $30,900.

Petitioner De Weerth, a German citizen residing in Bonn-Bad Godesberg, West Germany, claims that her father purchased the Monet in or about 1908. She also claims that she inherited it from her father upon his death in 1922, and that it remained in her possession until August, 1943. In that month, De Weerth claims that she sent the painting in a furniture van to her sister, Gisela von Palm, at her castle in Oberbalzheim, in southern Germany, for safekeeping during World War II. De Weerth alleges that she never saw the painting again.

The painting allegedly disappeared from Mrs. von Palm's custody.[3] Upon learning of the loss of the painting, De Weerth, whom the Court of Appeals described as a "wealthy and sophisticated art collector," 836 F.2d at 112, took only four steps in 35 years to locate it. First, in 1946 (a year after the alleged loss), she allegedly filed a report with the military government then administering Germany. No documentary proof of any such report was offered at trial. Second, in 1948, she wrote a

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2 Respondents also adopt the statement of facts contained in the opinion of the United States Court of Appeals for the Second Circuit. *De Weerth v. Baldinger*, 836 F.2d 103, 104-06 (2d Cir. 1987).

This statement of the case makes no effort to correct the various factual misstatements contained in the Petition. None of these misstatements is relevant to the issue of whether or not *certiorari* should be granted.

3 Mrs. von Palm, the only witness competent to testify about the disposition of the painting, died on June 11, 1983, four months after the present action was commenced. De Weerth did not preserve her testimony.

letter to a lawyer, Dr. Heinz Frowein, concerning the Monet and several other paintings and art objects lost during the War. Dr. Frowein replied that De Weerth's insurance company would not indemnify her for the missing painting "because we cannot prove that it was a case of burglary." Frowein did nothing further. Third, in 1955, De Weerth sent a photograph of the Monet to Dr. Alfred Stange, a historian of medieval art who possessed no expertise in French Impressionist painting. Dr. Stange advised De Weerth that her evidence was insufficient and did nothing. Fourth, and finally, in 1957, De Weerth filled out a report for the *Bundeskriminalant* listing art works lost during the War. A copy of the report was not offered at trial. De Weerth did nothing to locate the painting after 1957.

The Court of Appeals observed that "[c]onspicuously absent from [De Weerth's] attempts to locate the painting is any effort to take advantage of several mechanisms specifically set up to locate art lost during World War II." 836 F.2d at 111. Pursuant to an agreement among the Allies, Central Collecting Points ("CCP") were established throughout Germany, where recovered works of art were identified and stored, and where the owners of missing works could inquire after their property. De Weerth knew of the CCP's presence in post-War Germany and its role in collecting lost works of art and facilitating their return. She never contacted any CCP regarding the Monet.

The United States also conducted its own independent program to recover art work stolen during World War II. In the post-War period, the American Commission for the Production and Salvage of Artistic and Historic Monuments in War Areas ("American Commission") sent letters to museums, libraries, universities and art dealers identifying missing works of art and requesting assistance in locating them. The State Department also initiated a program to return works of art displaced during World War II. De Weerth failed to avail herself of these resources. Nor did she ever contact or retain any other museum, investigative agency, attorney, art expert or private investigator to assist her in locating the Monet.

De Weerth never looked for mention of the Monet in art publications. The Court of Appeals noted that "if De Weerth had undertaken even the most minimal investigation during this period [1957-1981], she would very likely have discovered the Monet, since there were several published references to it in the art world." 836 F.2d at 112. The Monet was twice displayed at public exhibitions and was also mentioned in four different published works during this period. The two public exhibitions were the *Festival of Art*, an exhibition held at the Waldorf-Astoria Hotel in New York in 1957, and *One Hundred Years of Impressionism*, an exhibition held at Wildenstein's gallery in New York in April, 1970. The Monet was mentioned in both exhibition catalogues; in addition, the Monet was illustrated in a book by Daniel Wildenstein entitled *Monet: Impressions*, published in New York and Lausanne, Switzerland in 1967. Finally, the Monet is described, photographed, and identified in the work *Claude Monet: Bibliographie et Catalogue Raisonné, Volume I, 1840-1881*, introduction by Daniel Wildenstein, published by La Bibliotheque Des Arts, Lausanne and Paris, in 1974. The Court of Appeals noted that "a catalogue raisonné is a definitive listing and accounting of the works of an artist," and concluded that De Weerth's failure to consult the Monet catalogue raisonné "is particularly inexcusable." 836 F.2d at 112.

De Weerth learned of Baldinger's possession of the Monet through Peter von der Heydt, De Weerth's nephew. In 1981, von der Heydt was told, in a chance conversation with a cousin, that De Weerth owned a Monet that disappeared during the War. Shortly thereafter, he consulted the Monet catalogue raisonné which he found in a museum in Cologne, less than 20 miles from where De Weerth has been living since 1957. The catalogue identified Wildenstein as a prior owner and exhibitor of the painting. In 1982, De Weerth commenced litigation against Wildenstein in the New York state courts to compel Wildenstein to identify the current owner. In that litigation, Wildenstein was directed to identify Baldinger. After Baldinger refused De Weerth's demand for the painting, the present litigation was commenced.

ARGUMENT

THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR REVIEW

Petitioner seeks review of a decision of the Second Circuit construing and applying the New York statute of limitations to a set of undisputed facts. The case raises no issue of constitutional law; it raises no issue of federal law. De Weerth merely objects to the manner in which a federal court applied state law although it was De Weerth, as plaintiff below, who chose to litigate a state law claim in a federal forum.

Moreover, De Weerth has miscast the issues. Contrary to her assertion, the Second Circuit did not "refuse to certify" the statute of limitations issue to the New York Court of Appeals. Neither petitioner nor respondents requested certification in the appeal to the Second Circuit. Only after De Weerth lost did she even intimate—in her petition for rehearing—that the Second Circuit was not the proper forum to resolve the issue.

In deciding this appeal, the Second Circuit merely assessed what the New York Court of Appeals would rule to be New York law in light of the existing body of law, and having made this assessment, applied it to the facts found by the district court. That is precisely the function of circuit courts sitting in diversity. This Court has often observed that it will rarely substitute its judgment respecting issues of state law for that of the lower federal courts, particularly where, as here, the circuit court is familiar with the law of the state whose law is dispositive.

POINT I

THE CASE TURNS ON THE CONSTRUCTION AND APPLICATION OF A NEW YORK STATUTE OF LIMITATIONS TO THE FACTS OF THIS PARTICULAR CASE

This case turns solely on the construction and application of a three-year New York statute of limitations to the facts of this particular case. In framing the issue on appeal, the Second Circuit stated:

> The [case] presents primarily the issue whether New York law, which governs this dispute, requires an individual claiming ownership of stolen personal property to use due diligence in trying to locate the property in order to postpone the running of the statute of limitations in a suit against a good-faith purchaser.

836 F.2d at 104. The Second Circuit held that New York law requires such due diligence and that, on the facts found by the district court, petitioner failed to exercise due diligence. Accordingly, the New York statute of limitations barred petitioner's action for recovery of an allegedly stolen painting brought almost forty years after petitioner claims it was stolen, and a quarter of a century after respondent had purchased the painting in good faith and for value.

In reaching this conclusion, the Second Circuit reasoned: (1) under New York law, the general rule that the three-year statute of limitations does not begin to run until a demand for the return of the property has been made and refused is subject to the settled exception that the demand which commences the running of the limitations period may not be unreasonably delayed (the "unreasonable delay rule"); (2) although New York courts have applied the unreasonable delay rule to cases in which the identity of the person to whom the demand has been made is known, the applicability of this rule *before* the identity of such person is known is an open question under New York law; and (3) on the basis of existing precedent and the policy considerations underlying the unreasonable delay rule, the New York Court of Appeals would impose a duty of reasonable diligence

in attempting to locate property prior to the time the current possessor is identified. In reaching this last conclusion, the Second Circuit observed:

> This Court's role in exercising its diversity jurisdiction is to sit as another court of the state. *Guaranty Trust Co. v. York*, 326 U.S. 99, 108, 65 S. Ct. 1464, 1469, 89 L.Ed. 2079 (1945). When presented with an absence of controlling state authority, we must "make an estimate of what the state's highest court would rule to be its law." *Stafford v. International Harvester Co.*, 668 F.2d 142, 148 (2d Cir. 1981) (quoting *Bailey Employment System, Inc. v. Hahn*, 655 F.2d 473, 477 (2d Cir. 1981)). In making that determination, this Court may consider all of the resources that the New York of Appeals could use, *see Francis v. INA Life Insurance Co.*, 809 F.2d 183, 185 (2d Cir. 1987), including New York's stated policies and the law of other jurisdictions.

836 F.2d at 108.

In *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944), this Court stated: "ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." *See, e.g., Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) ("state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review"); *Bishop v. Wood*, 426 U.S. 341, 346 n.10 (1976) ("In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable."). Federal courts, sitting in diversity, are frequently asked to resolve open issues of state law. In such circumstances, it is the province of the federal courts "to sit as another court of the state." That is the essence of diversity jurisdiction. Here, there is nothing "exceptional" about either the law involved—a state statute of limitations—or the manner in which the Second Circuit applied it. *See* discussion *infra* at 13-14.

POINT II

THE SECOND CIRCUIT PROPERLY REVIEWED THE DISTRICT COURT'S DUE DILIGENCE HOLDING *DE NOVO*

The Second Circuit's conclusion that "[w]here, as here, the issue is the application of a legal standard—'reasonable diligence'—to a set of facts, review is *de novo*," 836 F.2d at 110, is a statement of a fundamental proposition of law.

De novo review is the appropriate standard for the application of law to fact determinations. *See Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491 (1937) (tax board decision, involving legal conclusions derived from questions of fact, subject to independent legal review). In *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 501 (1984), this Court held that "[Fed. R. Civ. P.] 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Accord Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 855 n.15 (1982); *Pullman-Standard v. Swint*, 456 U.S. 273, 289-90 n. 19 (1982) (Rule 52(a) does not apply to issue whether the facts satisfy a statutory standard; such questions are "independently reviewable by an appellate court"); *see also Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1175 (5th Cir. 1980) (clearly erroneous rule does not apply to findings made under an erroneous view of controlling legal principles); *Owen v. Commercial Union Fire Ins. Co.*, 211 F.2d 488, 489 (4th Cir. 1954) (clearly erroneous standard of review does not apply to fact finding if a trial judge has committed an error of law which has manifestly influenced or controlled his findings). More specifically, circuit courts have on numerous occasions reviewed reasonable diligence findings *de novo*.[4]

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4 *See, e.g., Whaley v. Rodriguez*, 840 F.2d 1046, 1050-52 (2d Cir. 1988) (findings concerning reasonableness and due diligence subject to

Anderson v. Bessemer City, 470 U.S. 564 (1985), upon which petitioner heavily relies, is inapposite. That decision held that where an issue is one of "fact," as that term is used in Rule 52(a), a court of appeals should apply a clearly erroneous standard of review, even when the district court's findings "do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Id.* at 574. In this case, the Second Circuit did not review *de novo* the district court's factual findings regarding the efforts petitioner made to locate the painting; indeed, it accepted these facts as found by the district court. 836 F.2d at 104-06. Rather, the Second Circuit reviewed *de novo* the district court's conclusion about the legal significance of these facts,

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plenary review); *Carter v. Bennett*, 840 F.2d 63, 64-65 (D.C. Cir. 1988) (determination of reasonableness subject to *de novo* review); *Maloley v. R.J. O'Brien & Associates, Inc.*, 819 F.2d 1435, 1440-43 (8th Cir. 1987) (reviewing *de novo* CFTC's decision as to reasonable diligence in discovery of a claim); *United States v. Nates*, 831 F.2d 860, 862 (9th Cir. 1987) (issue of reasonable cause under Fourth Amendment is reviewable *de novo*); *United States v. Simmons*, 786 F.2d 479, 482-83 (2d Cir. 1986) (review of district court application of legal standard of "reasonable delay" is *de novo*); *Utica Mut. Ins. Co. v. Fireman's Fund Ins. Cos.*, 748 F.2d 118, 122 & n.3 (2d Cir. 1984) (issue of plaintiff's diligence in discovering fraud subject to plenary review); *Blitz v. Donovan*, 740 F.2d 1241, 1244 (D.C. Cir. 1984) (district court determination of reasonableness subject to *de novo* review); *Cook v. Avien, Inc.*, 573 F.2d 685, 697 (1st Cir. 1978) (issue of securities purchaser's reasonable diligence "is a sufficiently mixed question of law and fact to permit an appellate court to resolve the issue"); *United States Fidelity & Guar. Co. v. Royal Nat'l Bank of N.Y.*, 545 F.2d 1330, 1332-33 (2d Cir. 1976) (where liability is predicated on good faith, including observance of reasonable business standards and due diligence, courts are not bound to the "clearly erroneous" standard); *Gediman v. Anheuser Busch, Inc.*, 299 F.2d 537, 547 (2d Cir. 1962), *quoting Romero v. Garcia & Diaz, Inc.*, 286 F.2d 347, 355 (2d Cir.), *cert denied*, 365 U.S. 869 (1961) ("it has long been the rule in this Circuit that 'a judge's determination of negligence, as distinguished from the evidentiary facts leading to it, is a conclusion of law freely reviewable on appeal and not a finding of fact entitled to the benefit of the 'unless clearly erroneous' rule"); *Dale v. Rosenfeld*, 229 F.2d 855, 858 (2d Cir. 1956) (court not bound by clearly erroneous standard in reviewing reasonable diligence finding).

and concluded that the efforts of petitioner did not constitute due diligence, as that term was defined and applied in the seminal case of *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982), *aff'g* 536 F. Supp. 829 (E.D.N.Y. 1981).

Nothing in *Bessemer City* counsels against *de novo* review of the application of a legal standard to a particular set of facts. Indeed, in a decision rendered subsequent to *Bessemer City*, this Court recognized the distinction between review of factual findings and review of the application of a rule of law to factual findings. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 713-14 (1986).

POINT III

THE SECOND CIRCUIT WAS NOT OBLIGATED TO CERTIFY THE QUESTION TO THE NEW YORK COURT OF APPEALS

De Weerth also claims that the Second Circuit erred in declining to certify the statute of limitations question to the New York Court of Appeals. In its opinion, the Second Circuit noted that it had, *sua sponte*, considered whether to certify the question and concluded that certification was unnecessary. 836 F.2d at 108 n.5. On appeal, no party had proposed certification. Now that the Second Circuit has ruled against De Weerth, she suddenly insists that the Second Circuit abused its discretion by not certifying the question to the New York Court of Appeals. Contrary to petitioner's assertion, the Second Circuit is the proper forum to resolve such issues, especially in light of the circumstances of this case.

A. Certification Questions Are Committed to the Sound Discretion of Lower Federal Courts

As this Court has acknowledged, the use of the certification procedure "in a given case rests in the sound discretion of the federal court." *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974); *see also Barnes v. Atlantic & Pac. Life Ins. Co.*, 514 F.2d 704, 705 n.4 (5th Cir. 1975) ("much judgment, restraint and discretion" is used in certifying cases). This Court has fur-

ther held that there is no obligation to certify an issue even "where there is doubt as to local law and where the certification procedure is available." *Id.* at 390. As The Committee on Federal Courts of the New York City Bar Association has cautioned with respect to certification:

> In the past, federal courts have chosen, and wisely we believe, to certify questions in relatively few cases. While the procedure can be useful in a rare case, we believe it would in most cases merely add to the time and expense of resolving disputes and frustrate litigants who are properly before the federal courts.

The Committee on Federal Courts, *Analysis of State Laws Providing for Certification by Federal Courts of Determinative State Issues of Law*, 42 Rec. A.B. City N.Y. 101, 125 (1987).

The Second Circuit properly decided the state law issue itself. First, De Weerth did not request certification until the Second Circuit ruled against her and she submitted a petition for rehearing; second, De Weerth, as plaintiff in this diversity action, chose the federal forum to litigate her state law claim; third, the Second Circuit is familiar with the local law at issue because New York is a state within the territorial boundaries of the Second Circuit; fourth, by the time the Second Circuit decided the appeal, the case had been in litigation for almost five years, and further cost and delay was not justified; and fifth, the issue is not one that will recur with the degree of frequency necessary to justify certification. Courts addressing the question whether to certify an issue to the highest court of a state have considered all of the foregoing factors as relevant to the decision whether to certify.[5]

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5 *See, e.g., Lehman v. Dow Jones & Co.*, 783 F.2d 285 (2d Cir. 1986) (deciding not to certify issue where the court had been advised of certification procedure by a party two months after oral argument and one month prior to date of the opinion); *Harris v. Karri-On Campers, Inc.*, 640 F.2d 65, 68 (7th Cir. 1981) (denying motion to certify in part because motion was made after trial); *Cartwell v. Univ. of Massachu-*

The Petition discusses only one of the above factors. Petitioner disputes the Second Circuit's observation that the issue is unlikely "to recur with sufficient frequency to warrant use of the certification procedure." The "evidence" De Weerth cites to support her argument (Petition at 18, n.*) is not part of the record below and may or may not be correct. At most, petitioner cites only one pending case where the issue of a plaintiff's unreasonable delay is being litigated. Prior experience has shown that this issue arises extremely infrequently. The exceptional nature of the issue is implicit in the fact that it had not previously been litigated in any reported decision of the New York courts. In addition, this is only the third reported case in the New York courts to raise the issue of unreasonable delay in the pursuit of art objects.[6] Such evidence hardly suggests that the issue occurs so often that the Second Circuit abused its discretion in not referring it to the New York Court of Appeals.[7]

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setts, 551 F.2d 879, 880 (1st Cir. 1977) ("bar should take note that one who chooses the federal courts in diversity actions is in a peculiarly poor position to seek certification"); *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (certification is particularly appropriate where the federal court is an outsider "lacking the common exposure to local law which comes from sitting in the jurisdiction"); *Marston v. Red River Levee & Drainage Dist.*, 632 F.2d 466, 468 n.3 (5th Cir. 1980) (denying motion to certify in part because case was "long in the tooth"); *Kidney v. Kolmar Laboratories*, 808 F.2d 955, 957 (2d Cir. 1987) (certified issue should be a recurrent one); *see generally* 17A C.A. Wright, A.R. Miller & E.H. Cooper, *Federal Practice & Procedure* § 4248 (1988).

6 The others are *Menzel v. List*, 22 A.D.2d 647, 253 N.Y.S.2d 43 (1st Dep't 1964) and 49 Misc. 2d 300, 267 N.Y.S.2d 804 (Sup. Ct. N.Y. County 1966), *modified*, 28 A.D.2d 516, 279 N.Y.S.2d 608 (1st Dep't 1967), *modification rev'd*, 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969) and *Elicofon*, 536 F. Supp. 829, *aff'd*, 678 F.2d 1150.

7 The issues which have been certified by courts in the past are ones that clearly occur with much greater frequency. They include how to interpret a standardized provision in a life insurance contract, *see Barnes v. Atlantic & Pac. Life Ins. Co.*, 514 F.2d 704 (5th Cir. 1975), or whether money advanced by an insurer on behalf of its insured to an injured party, prior to settlement or judgment of a tort action, is "payment of any monies" within the meaning of the New York Social Services Law, *see Kidney v. Kolmar Laboratories*, 808 F.2d 955.

B. The Second Circuit Correctly Decided That New York Law Imposes a Duty of Due Diligence on an Owner of Stolen Art

The Second Circuit's decision that New York law imposes a duty of due diligence on a person claiming rights to a valuable painting accords with New York's policy of favoring the good-faith purchaser and of discouraging stale claims; it also accords with the approach taken by other jurisdictions.

As the Second Circuit noted, the substantive elements of a conversion action in New York include demand by the plaintiff and refusal by the defendant. This "demand/refusal" rule is intended to protect a good-faith purchaser by ensuring that before being made liable as a tortfeasor he will be informed of any defect in title. *See Elicofon*, 536 F. Supp. at 848; 836 F.2d at 108-09. The due diligence requirement accords with the purpose behind the "demand/refusal" rule insofar as it protects the good-faith purchaser against the possibility that a plaintiff's demand, and hence the accrual of the statute of limitations, would be indefinitely delayed. Moreover, the due diligence requirement promotes the policies underlying New York's statutes of limitations generally by protecting defendants against stale claims, based on lost evidence, faded memories and unavailable witnesses, and by giving security to property holders. Finally, the due diligence requirement accords with the law in other jurisdictions which "have adopted limitations rules that encourage property owners to search for their missing goods."[8] 836

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8 The "demand/refusal" rule used in New York to determine the accrual of a cause of action in stolen art cases is unusually indulgent to plaintiffs. Most states have adopted more restrictive rules. For example, some states hold that the statute of limitations begins to run in favor of a thief on the date of the theft unless the theft is accompanied by a positive act of concealment done to prevent detection. *See, e.g., Jackson v. American Credit Bureau, Inc.*, 23 Ariz. App. 199, 531 P.2d 932 (1975); *Howk v. Minnick*, 19 Ohio St. 462 (1869); *Adams v. Coon*, 36 Okla. 644, 129 P. 851 (1913). Other jurisdictions follow the rule that the statute of limitations begins to run in favor of an innocent purchaser on the date of his acquisition of stolen property. *See, e.g., Christensen Grain, Inc. v. Garden City Coop. Equity Exch.*, 192

F.2d at 109. The Second Circuit noted that "the fact that plaintiff's interpretation of New York law would exaggerate its inconsistency with the law of other jurisdictions weighs against adopting such a view." *Id.*

In light of (1) New York's policy of favoring the good-faith purchaser and discouraging stale claims and (2) the approach to actions to recover property in other jurisdictions, *id.*, the Second Circuit correctly held that under New York law an owner's obligation to make a demand without unreasonable delay includes an obligation to use due diligence to locate stolen property.

Kan. 785, 391 P.2d 81 (1964); *Luter v. Hutchinson*, 30 Tex. Civ. App. 511, 70 S.W. 1013 (1902). Still other courts have held that the statute of limitations begins to run despite a plaintiff's ignorance of a conversion. *See, e.g., Mastellone v. Argo Oil Corp.*, 46 Del. 102, 82 A.2d 379 (1951). Under any of these more widely accepted rules petitioner's claim would be untimely by several decades.

CONCLUSION

The Petition for a writ of *certiorari* should be denied.

Dated: New York, New York
May 23, 1988

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